Supreme Court, U.S.
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No. 96-608

In The

Supreme Court of the United States

October Term, 1996

RANBIR S. SAHNI,

Petitioner,

vs.

AMERICAN DIVERSIFIED INVESTMENT CORPORATION; KATZ BROTHERS DEVELOPMENT CORP. II; CONTINENTAL HOUSING PARTNERS, LTD.; MDC INVESTMENTS, INC.; PAULA QUINN; SKYLINE PROPERTIES and MATT MADISON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. In his Petition for Writ of Certiorari, Petitioner pointed out that a fair reading of the relevant subsections of 12 U.S.C. § 1821(d) granting to the Federal Deposit Insurance Corporation (FDIC) receivership powers over the property and assets of a failed financial institution limits the scope of the receivership estate to the assets and property *"of the institution."* (emphasis added) (Pet. p. 4). Respondents do not dispute this observation. Instead, Respondents argue that the FDIC's receivership powers should be "reasonably interpreted" to include the power to transfer assets which, although not owned by the failed institution, may be indirectly controlled by the institution. (Opposition p. 7)

Following the logic of the Ninth Circuit Court of Appeals, Respondents rely upon applicable state law when they argue that the "unbroken chain of ownership and control running from ADSB to ADP" include the HUD Partnership interests within the receivership estate for liquidation purposes. (Opposition p. 6) Respondents claim that, "under state law, ADSB itself could have sold the HUD Partnership interests, exercising its control over its wholly owned subsidiary corporation, ADIC . . . " (Opposition p. 5). Respondents' claim, however, is highly misleading and entirely unsupported by applicable authority. The application of California Corporations Code, Section 15509(1)(b) denies American Diversified Savings Bank (ADSB) and its subsidiary American Diversified Investment Corporation (ADIC) the right to dispose of American Diversified Partners (ADP)'s Department of Housing and Urban Development (HUD)

Partnership interests absent the consent of all ADP partners. (Pet. 7; see also Opposition p. 5) And it is undisputed that as a limited partner in American Diversified Partners (ADP), Petitioner never consented to the sale of ADP's HUD Partnership interests. (Pet. p. 2) Throughout this case, Petitioner has always maintained that applicable state law prevented the sale of ADP's assets under the circumstances of this case. Respondents offer no state law authority to the contrary.

Respondents attempt to further bolster their claim by arguing that ADSB "holds significant assets through *wholly owned* subsidiaries" (emphasis supplied) (Opposition p. 7). As applied to the instant case, however, that contention is incorrect. There is only *one wholly owned* subsidiary involved in the instant case – not two, as Respondents imply.

Here, ADSB's wholly owned subsidiary is ADIC *alone* (Opposition p. 2). ADIC is the general partner in ADP (Opposition 2). It is undisputed that ADP is the owner of the HUD Partnerships – the "significant assets" referred to by Respondents – *not* ADIC, as their misguided contention suggests (Opposition p. 3). ADP is *not* wholly owned by any person or entity. Instead, it is undisputed fact that ADP is owned by ADSB *and Petitioner* together (Opposition pp. 2, 3).

Therefore, from the state law perspective, the entire premise underlying Respondents' "chain of ownership and control" is unsound.

In an effort to avoid the adverse consequences of state law application, Respondents attempt to support their opposition with the application of federal law in the

form of Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA).

Citing the Congressional intent behind FIRREA, Respondents claim that the receivership powers granted to the FDIC should be "reasonably interpreted" to encompass the HUD Partnership interests owned by ADP. (Opposition p. 7) In support, Respondents claim that the receiver's powers should be extended beyond the words of FIRREA to include the assets owned by ADP upon the flawed premise that control is the legal equivalent of ownership. In this endeavor, Respondents have entirely ignored the Supreme Court's holding in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) that in its role as receiver, the FDIC is placed in the shoes of the ADSB to work out ADSB's claims under *state law*, except where some provision of FIRREA provides otherwise. (Pet. 4)

Relying heavily upon *In re Landmark Land Co. of Oklahoma, Inc.*, 973 F.2d 288 (4th Cir. 1992) Respondents argue that a receiver's control over a separate entity is "tantamount to ownership of the controlled entity's assets for liquidation purposes." (Opposition p. 6) However, the Court in *Landmark* did not so hold. Instead, the *Landmark* Court correctly determined that the RTC, as conservator, could lawfully exercise the RTC's *ownership rights* over the subsidiaries of the institution.

> "The RTC is well within its statutory authority to take control of the Clock Tower subsidiary in which it holds a 100% ownership interest . . . *Through Clock Tower*, the RTC can then control the Landmark subsidiaries. * * * [T]he district court may not prevent the RTC from

exercising its *lawful ownership rights . . .* "
(Emphasis added.)

Landmark, p. 290)

Thus, the decision embodied in *Landmark* fully supports Petitioner's position in the instant case. In *Landmark*, by implicit reliance upon applicable state law, the District Court of Appeals for the Fourth Circuit correctly recognized the limited power of the RTC *as a shareholder* in defining the scope of the receivership estate.

Respondents' reliance upon other cases is likewise misplaced. *Bender v. CenTrust Mortgage Corp.*, 833 F.Supp. 1540 (S.D. Fla. 1992), unlike the instant case, deals with assets held solely by a wholly owned subsidiary of the failed institution. *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133 (9th Cir. 1996) and *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402 (9th Cir. 1992) are also unavailing. Both *American Capital* and *San Vicente* deal with the scope of Security and Exchange Commission receiverships. The scope of those equity receiverships relies upon the equity power of federal courts and has no relationship whatsoever to FIRREA (*American Capital*, at 1145).

2. Respondents' arguments that federal law prohibits a court from rescinding the FDIC's sale of ADP's HUD Partnership interests is unsupported by applicable authority and contrary to established law.

It is undisputed that the language of 12 U.S.C. 1821(j), subject to exceptions not here relevant, bars the district court from taking any action to restrain or affect the exercise of powers or functions of the FDIC as receiver. In addition, Respondents concede, as they must,

that in the case of *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed. 2d 602 (1989), the Supreme Court permitted a challenge to action taken by the FDIC outside of its statutory authority. (Opposition pp. 8-9). Nor do Respondents dispute Petitioner's reliance upon *Coit* for the proposition that courts may grant injunctive relief against the FDIC if the power sought to be enjoined is beyond the powers granted by statute.[1] *Coit* at 574.

In *Landmark*, the authority upon which Respondents place great reliance elsewhere, it is clearly recognized that FIRREA does not preclude injunctive relief when the receiver acts *beyond the scope* of its statutory powers. *Landmark* at 289.

Thus, if the FDIC has acted beyond its statutory powers in transferring ADP's HUD Partnership interests, FIRREA does not deprive the district court of jurisdiction to rescind those sales.

3. Respondents finally argue that Section 15509 of the California Corporations Code, prohibiting certain sales of partnership property without the consent of all partners, is preempted by FIRREA.

In 12 U.S.C. 1821(d)(2)(G)(i)(II), the FDIC, as receiver, is specifically authorized to "transfer any asset or liability *of the institution in default* * * * without any approval, assignment, or consent with respect to such transfer" (emphasis supplied). However, by the plain language of

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[1] Respondents assume that a rescission of the sale of ADP's assets would effectively operate as an injunction against such sale. (Opposition p. 8)

the statute, only "assets of the institution in default" are affected and only with respect to the FDIC acting in its capacity as receiver. Thus, where, as here, the FDIC sells assets of an entity *other than* the institution in default or acts outside of its capacity as receiver, 12 U.S.C. 1821(d)(2)(G)(i)(II) does not apply and, therefore, does not preempt the application of California Corporations Code, Section 15509.

CONCLUSION

Respondents have not disputed the proposition that this case presents an important federal question concerning the statutory power of the FDIC, as receiver, which should be settled by the Supreme Court. Nor have Respondents denied that the published decision of the Ninth Circuit Court of Appeals, which Petitioner now attacks, conflicts with the Supreme Court's decision in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994)

The Supreme Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted,

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January 1997